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7 UNITED STATES DISTRICT COURT FOR THE
8 DISTRICT OF ALASKA
9 AT ANCHORAGE

10 AGWEST FARM CREDIT, PCA

11 Plaintiff,

12 v.

13 KIMBERLY C, O.N. 596518, its Engines,
14 Machinery, Appurtenances, etc.,
15 and RM 250, O.N. 928702, its Machinery,
Appurtenances, etc.,
in Rem,

16 and

17 YAK TIMBER, INC. an Alaska
18 corporation,
in personam,

19 Defendants.

NO. 3:23-CV-00072-HRH

**MOTION FOR PRELIMINARY
INJUNCTION TO MAINTAIN
LOCATION OF AND INSPECT
COLLATERAL VESSELS**

ORAL ARGUMENT REQUESTED

20
21 **I. INTRODUCTION AND RELIEF REQUESTED**

22 Plaintiff AgWest Farm Credit Services, PCA, formerly known as Northwest Farm
23 Credit Services, PCA (“**Farm Credit**” or “**Plaintiff**”), seek a preliminary injunction: (1)
24 barring Defendants from relocating and further jeopardizing Farm Credit’s Tug and Barge
25 collateral, and (2) permitting Farm Credit to conduct an updated marine survey on the
26

MOTION FOR PRELIMINARY INJUNCTION - 1

CAIRNCROSS & HEMPELMANN, P.S.
ATTORNEYS AT LAW
524 2nd Ave, Suite 500
Seattle, WA 98104

Vessels, which is a necessary step to obtaining insurance on these currently uninsured/underinsured assets. In essence, Farm Credit seeks to maintain the status quo by enjoining Defendants from dissipating assets and ensuring the safety and protection of Farm Credit's collateral during the pendency of this action.

II. STATEMENT OF FACTS

A. Farm Credit's \$13 million in secured loans to Yak Timber are in default.

Farm Credit is a member-owned agricultural lending cooperative that provides financing and related services to farmers, ranchers, agribusinesses, commercial fishermen, timber producers, rural homeowners and crop insurance customers in a seven-state territory in the Western United States, including Alaska. AgWest is part of the Farm Credit System and is a cooperative formed under federal law, in which its customer-members own shares and receive patronage on account of their interests. Thus rather than being privately owned, AgWest is owned by the agricultural producers that it services, including native and other tribal-owned businesses.¹

Starting in the summer of 2020, Farm Credit made a series of loans (the "**Loans**") to Yak Timber, Inc. ("**Yak Timber**"). Yak Timber is the wholly-owned subsidiary of Yak-Tat Kwann, Inc. ("**YTK**"), an Alaska Native Village Corporation. The loans were made to assist Yak Timber with financing the purchase of logging equipment and to provide a line of credit and to pay fees and costs in connection with the Loans. Details concerning these

¹ See, <https://agwestfc.com/about/about-us> (last visited May 5, 2023).

1 loans and their supporting documents are contained in the Verified Complaint filed by
2 Farm Credit at Dkt. 1, and are fully incorporated herein.²

3
4 Beginning in early 2022, Yak Timber began to fall out of compliance with its
5 reporting requirements. In fall of 2022, Yak Timber failed to make loan payments when
6 due. Since then, Farm Credit issued several notices of default, but continued to stay in
7 communication with Yak Timber about the status of its Loans.³ As of March 21, 2023, the
8 balance on the Loans exceeded \$13 million.⁴

9
10 **B. Prior to this suit, Yak Timber fails to provide Proof of Insurance or**
11 **information on the Status of the Vessels; Farm Credit subsequently learns that the**
12 **Vessels are uninsured/underinsured.**

13
14 Yak Timber remained in default, both as to disclosure and payment. Prior to filing
15 suit, Farm Credit made several requests for proof of insurance on its Tug and Barge
16 collateral (the “**Vessels**”) and received no meaningful response.⁵ During this period, there
17 were times when Farm Credit had no idea where the Vessels were located in part because
18 the Tug’s transponder had been turned off.⁶ Most recently, the Tug resurfaced at Broken
19 Oar Cove but is now being operated, having travelled from Yakutat to Cordova, and is now
20 en route to Valdez.⁷

21 After this lawsuit was filed, Yak Timber eventually provided proof of some
22 insurance for the Vessels but the stated coverage is either wholly absent or inadequate: the
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24 ² Capitalized terms not otherwise defined herein retain their meaning as stated in the Verified Complaint.

25 ³ See, Decl. David Poor (“Poor Decl.”), ¶ 2.

26 ⁴ Dkt. 1, ¶ 9.1

⁵ Poor Decl. ¶ 5.

⁶ *Id.*

⁷ Poor Decl., ¶ 7.

1 liability insurance is in an insufficient amount and there appears to be no pollution
2 insurance on either Vessel.⁸ This presents an immense risk of loss and injury to Farm
3 Credit, since any damage or loss to Vessels would not be adequately insured,
4 compromising Farm Credit's security. Unfortunately, Farm Credit cannot simply obtain
5 forced-placed insurance on these Vessels, as it might normally do where a borrower fails
6 to adequately insure collateral.⁹ Farm Credit filed this arrest action as the Vessels must be
7 arrested before insurance can be obtained.
8
9

10 **C. Yak Timber fails to cooperate in allowing Farm Credit to inspect the**
11 **Vessels.**

12 In addition to the insurance issue, Farm Credit has not been able to obtain sufficient
13 information from Yak Timber about the Vessels' condition, whether they are seaworthy,
14 and their current activities.¹⁰ Through its own independent investigation, Farm Credit was
15 able to locate the Vessels, which as of the time of this filing appear to be en route from
16 Cordova to Valdez.¹¹
17

18 After this lawsuit was filed, Yak Timber provided prior vessel surveys and stated
19 that it would provide further information about the Vessels to Farm Credit.¹² Yak Timber
20 initially indicated its agreement to an inspection of the Vessels so that Farm Credit could
21 obtain up to date information, discern the state of its collateral, and obtain insurance (and
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25 ⁸ Poor Decl. ¶ 8.

26 ⁹ Poor Decl., ¶ 9.

¹⁰ Poor Decl., ¶ 10.

¹¹ Poor Decl., ¶ 7.

¹² Poor Decl., ¶ 10, Ex. A.

1 avoid filing this Motion).¹³ In preparing to inspect the Vessels, Farm Credit also requested
2 documentation about the Vessels, including ABS class documentation, repair/maintenance
3 records, and information about the safety of inspecting the enclosed spaces on the barge.¹⁴
4 Having this information is critical to an effective and safe inspection of the Vessels.¹⁵
5 However, despite initial promises to cooperate, Yak Timber still has not provided the
6 requested information or taken other steps to facilitate an agreed inspection—something
7 Farm Credit is entitled to under the loan documents.¹⁶
8
9

10 **D. The Vessels appear to be operating without compliance with applicable**
11 **safety and regulatory documentation.**

12 It also appears that the Vessels do not have current safety and regulatory
13 documentation. According to investigations done by Farm Credit’s agent, the Barge has an
14 expired Certificate of Inspection, Oil Spill Certificate, and Certificate of Documentation,
15 and the tug also has an expired Certificate of Documentation.¹⁷ There are also questions
16 about the current seaworthiness of the Vessels, and whether they have updated fire
17 suppression, EPIRB, and other safety systems on board.¹⁸ These questions raise serious
18 concerns as these failures may implicate the seaworthiness of the Vessels, the safety of the
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23 ¹³ Poor Decl., ¶ 11. The insurance broker engaged by Farm Credit has stated that an updated survey must
24 be conducted to place new hull insurance on the Vessels. *Id.*

25 ¹⁴ Declaration of Buck Fowler in Support of Motion for Preliminary Injunction (“Fowler Decl.”), ¶ 5–8.

26 ¹⁵ *Id.*

¹⁶ Poor Decl., ¶ 12.

¹⁷ Fowler Decl., ¶ 5.

¹⁸ *Id.*

1 crew, the protection of the marine environment, and ultimately the sanctity of Farm
2 Credit's collateral.¹⁹

3
4 **E. The Vessels are being exposed to operational risk; Farm Credit is**
5 **entitled to inspect its collateral, obtain insurance, and prepare for arrest.**

6 Finally, Farm Credit recently learned that Yak Timber may be planning to operate
7 and move the Vessels (without pollution insurance, adequate liability insurance and with
8 expired safety/regulatory documentation).²⁰ At the same time it has promised to cooperate
9 and be forthcoming with information about the Vessels, Farm Credit has learned that Yak
10 Timber has loaded the barge and continues to move the Vessels from their current
11 location.²¹ This is quite troubling to Farm Credit as it risks them losing track of this
12 valuable collateral, and exposes the underinsured Vessels to operational risk. For this
13 reason, Farm Credit seeks the Court's assistance in maintaining the *status quo* on the
14 Vessels' location as of the filing of this suit.²²

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16
17 The uncertainty regarding the location, condition, and operation of the Vessels and
18 Yak Timber's ongoing default under the Loans raises significant concerns about Yak
19 Timber's ability to supply sufficient cash to operate, maintain, and protect the Vessels.²³

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24 ¹⁹ Fowler Decl., ¶¶ 5, 6, 8.

25 ²⁰ Poor Decl., ¶ 14.

26 ²¹ Poor Decl., ¶ 7.

²² Because the Vessels are in constant motion, Farm Credit anticipates asking the Court for potential relocation to an area that is readily accessible by commercial transportation and viable for commercial inspection, if at the time of hearing on this Motion they are not in such a location.

²³ Poor Decl., ¶ 14.

1 Farm Credit's efforts to obtain assurance that Yak Timber has sufficient funds to protect
2 the Vessels has thus far been unfruitful.²⁴

3
4 While Farm Credit is very concerned about the condition of and risks to the Vessels,
5 it cannot take the risk of arresting the Vessels without first knowing their condition,
6 including their seaworthiness, as doing so would present significant risk to any vessel
7 custodian.²⁵ Farm Credit has identified a potential custodian, who confirms that
8 information on the Vessels' condition and seaworthiness would be important for a
9 successful arrest.²⁶ Accordingly, Farm Credit seeks the assistance of the Court in allowing
10 it to conduct pre-arrest due diligence, with the ultimate eye towards obtaining adequate and
11 proper insurance for its collateral.
12

13
14 The information needed to allow Farm Credit to proceed with obtaining insurance
15 on the Vessels can be obtained through an inspection and survey of the Vessels, supported
16 by sufficient documentation. Allowing Farm Credit to conduct a marine survey does not
17 change the status quo: it presents no risk to or burden on Yak Timber, and is something
18 Farm Credit is entitled to do under its Loan documents anyway.²⁷
19

20 III. STATEMENT OF ISSUES

21 Should this court issue a preliminary injunction: (1) barring Defendants from further
22 relocating Farm Credit's Tug and Barge collateral, or requiring delivery to the nearest port
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24 ²⁴ *Id.*

25 ²⁵ Fowler Decl., ¶ 7–8.

26 ²⁶ Fowler Decl., ¶ 8.

27 ²⁷ See Verified Complaint, Ex. G, Dkt. 1-7, at ¶ 4.2, Ex. H, Dkt. 1-8 at ¶ 4.2. (“On reasonable notice, the Lender has the right at any time to inspect or survey the Vessel to ascertain its condition and to satisfy itself that the Vessel is being properly repaired and maintained.”).

1 regularly serviced by commercial transportation and viable for conducting an inspection,
2 and (2) authorizing Farm Credit to conduct a marine survey of the Vessels, such that Farm
3 Credit can obtain insurance for its currently uninsured/underinsured collateral?
4

5 6 **IV. EVIDENCE RELIED UPON**

7 This Motion is supported by the Verified Complaint filed at Dkt. 1, and the
8 Declarations of David Poor and Buck Fowler, and exhibits filed therewith.
9

10 **V. LEGAL STANDARD AND AUTHORITY**

11 **A. Preliminary Injunction Standard**

12 “[T]he legal standards applicable to TROs and preliminary injunctions are
13 ‘substantially identical.’” *Wash. v. Trump*, 847 F.3d 1151, 1159 n.3 (9th Cir. 2017)
14 (quoting *Stuhlbarg Int’l Sales Co., Inc. v. John D. Brush & Co., Inc.*, 240 F.3d 832, 839 n.7
15 (9th Cir. 2001)). “A party seeking a preliminary injunction must meet one of two variants
16 of the same standard.” *Alliance for the Wild Rockies v. Pena*, 865 F.3d 1211, 1217 (9th Cir.
17 2017). “Under the original *Winter* standard, a party must show ‘that he is likely to succeed
18 on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief,
19 that the balance of equities tips in his favor, and that an injunction is in the public interest.’
20 ” *Id.* (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)). “Under the
21 ‘sliding scale’ variant of the *Winter* standard, ‘if a plaintiff can only show that there are
22 serious questions going to the merits—a lesser showing than likelihood of success on the
23 merits—then a preliminary injunction may still issue if the balance of hardships tips sharply
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1 in the plaintiff's favor,' and the other two Winter factors are satisfied.'" *Id.* (quoting *Shell*
2 *Offshore, Inc. v. Greenpeace, Inc.*, 709 F.3d 1281, 1291 (9th Cir. 2013)). A plaintiff need
3 not establish that he is likely to succeed on the merits of all his claims. A TRO or
4 preliminary injunction may issue if a plaintiff can show he is likely to succeed on one claim
5 and that he meets the other three requirements for injunctive relief. *League of Wilderness*
6 *Defenders/Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755, 766 n.3
7 (9th Cir. 2014).
8

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10 "A [temporary restraining order] or [a] preliminary injunction can take two forms."
11 *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 878 (9th Cir.
12 2009). "A prohibitory injunction prohibits a party from taking action and 'preserve[s] the
13 status quo pending a determination of the action on the merits.'" *Id.* at 878–79 (quoting
14 *Chalk v. U.S. Dist. Court*, 840 F.2d 701, 704 (9th Cir.1988)). On the other hand, a
15 mandatory injunction is one which "'orders a responsible party to take action.'" *Id.* at 879
16 (quoting *Meghrig v. KFC W., Inc.*, 516 U.S. 479, 484 (1996)). "In general, mandatory
17 injunctions 'are not granted unless extreme or very serious damage will result and are not
18 issued in doubtful cases or where the injury complained of is capable of compensation in
19 damages.'" *Id.* (quoting *Anderson*, 612 F.2d at 1115).
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23 **B. Farm Credit is likely to succeed on the merits of its Breach of Contract,**
24 **Arrest, and Mortgage Foreclosure claims.**

25 Farm Credit's request satisfies the first prong under the original *Winter* test:
26 likelihood of success on the merits (and because it satisfies this prong, discussion

1 concerning the sliding scale variant is unnecessary). Farm Credit filed suit for amounts due
2 and owing under the Loans, totaling \$13,301,336.39 as of March 21, 2023. Although Yak
3 Timber has not yet answered, it cannot be reasonably disputed that it is in default under the
4 Loan Documents, and that such sums are owed. Yak Timber has not made any payments
5 towards the Loans since November 1, 2022 and is in default. Farm Credit accelerated the
6 debt on March 9, 2023, and all balances are now due and owing. *See* Verified Complaint,
7 Dkt. 1, at ¶ 7.3; Exhibit I, Dkt. 1-9. Accordingly, Farm Credit has an extremely high
8 likelihood of success on the merits for its claim for repayment of the unpaid and due loans
9 to Yak Timber. Since the Preferred Ship Mortgages on the Vessels are tied to Yak Timber's
10 compliance with the Loan terms, this default also means that Farm Credit is likely to
11 succeed on its request for arrest and foreclosure of the mortgages on the Vessels.
12
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15 **C. Farm Credit will suffer irreparable harm in the absence of preliminary**
16 **relief, as the collateral is uninsured/underinsured and at risk of loss**
17 **through damage or relocation.**

18 Farm Credit also satisfies the second prong under the *Winter* test: it will suffer
19 irreparable harm in the absence of relief. Following months of repeated requests for
20 assurance that the Tug and Barge are insured, Farm Credit has now learned that the Vessels
21 lack pollution coverage of any sort, and are underinsured for liability. Moreover, according
22 to the information available to Farm Credit, the Vessels do not have updated safety
23 equipment and lack current safety/regulatory documentation.
24

25 Given Defendant's apparent intent to operate these Vessels despite the lack of
26 adequate coverage and safety certifications, the potential risk of loss for any seafaring

1 collateral cannot be overstated. Operating a vessel in open waters or mooring or storing it
2 in any location other than dry dock presents a significant threat. This is especially true in
3 Alaska and waters where the Vessels are believed to be located, given the volatile and ever-
4 changing weather and water conditions. And, because the Vessels continue to remain in
5 operation, a pollution hazard or other accident threatens to prime Farm Credit's security
6 interest, in the absence of insurance. That Yak Timber has allowed Farm Credit's collateral
7 to remain uninsured/underinsured, and the concurrent risk of loss, amounts to irreparable
8 harm that can only be avoided if Farm Credit is permitted to survey the vessels and obtain
9 the appropriate insurance for them.
10
11

12 **D. The Balance of Equities tips heavily in Farm Credit's favor.**
13

14 Farm Credit satisfies the third prong: the balance of equities tips heavily in its favor.
15 Farm Credit has already attempted for months to communicate with Yak Timber to obtain
16 assurances that its Vessel collateral was adequately insured. Due to Yak Timber's lack of
17 response, it had no choice but to bring this suit to protect its collateral (and accordingly the
18 interests of its cooperative members). Since filing suit, Farm Credit has learned that the
19 Vessels are underinsured/uninsured. On the other hand, Yak Timber has had every
20 opportunity to provide proof of insurance to alleviate these concerns, instead opting to
21 remain silent and to provide only piecemeal information concerning the Vessels' status.
22
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24 Farm Credit suffers significant harm every day that its Vessel collateral remains
25 underinsured/uninsured and at risk of loss, and this harm is amplified by the fact that Yak
26 Timber appears to be operating the Vessels without adequate safety equipment and

1 documentation. Yak Timber suffers no harm by being prohibited from further relocating
2 the Tug and Barge, or being required to return the Vessels to the nearest port regularly
3 serviced by commercial transportation and viable for conducting an inspection until further
4 Court order, or by accommodating a marine survey of the Vessels.
5

6 **E. The public interest factor is neutral at worst, and weighs in favor of**
7 **granting an injunction at best.**

8 Farm Credit is a cooperative owned by its 23,000 members. Arguably, the public
9 maintains an interest in a federally-created co-op supporting local and regional agricultural
10 activities, being able to enforce its loan documents and protect its collateral. Moreover, the
11 public has an interest in commercial vessels maintaining adequate and appropriate
12 insurance and staying in compliance with safety and seaworthiness rules for maritime
13 activities conducted in coastal and open waters. However, for purposes of the *Winters*
14 analysis, this factor can also be considered neutral, without detracting from the finding that
15 an injunction is appropriate here.
16
17

18 **F. Both a prohibitory and mandatory injunction are necessary to prevent**
19 **irreparable harm to Farm Credit.**

20 The relief requested by Farm Credit, is both prohibitory and mandatory. First, Farm
21 Credit requests a preliminary injunction barring Defendants from further relocating Farm
22 Credit's Tug and Barge collateral from their current location, or to return the Vessels to the
23 nearest port regularly serviced by commercial transportation and viable for conducting an
24 inspection . This is prohibitory and maintains the status quo – *i.e.* the location of the Vessels
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1 during the pendency of this action.²⁸ Because Yak Timber decided to move the Vessels
2 after filing of this suit and after receiving Notice by Farm Credit to cease use or movement,
3 maintaining the status quo may require transporting the vessels back to Yakutat Bay, which
4 should nonetheless be considered prohibitory relief.
5

6 Second, Farm Credit requests a preliminary injunction permitting Farm Credit to
7 inspect and conduct a marine survey on the Vessels and requiring Yak Timber to provide
8 documentation regarding the Vessels and their classification and condition. These are both
9 necessary steps to obtaining insurance on these currently underinsured assets. While also
10 intended to maintain the status quo, this injunction would require some minimal action by
11 Yak Timber—confirming the location of the Tug and Barge, giving Farm Credit’s marine
12 surveyor access to the vessels, and giving Farm Credit access to certain vessel documents.
13
14

15 This relief toes the line between a prohibitory and the less-favored mandatory
16 injunction. However, the Court should grant this relief nonetheless, because as explained
17 above, serious damage will result if these Vessels remain uninsured/underinsured.
18 Moreover, the injury Farm Credit is seeking to prevent cannot be compensated in
19 damages—the Vessels, with a collective value of \$5.8 million as of May of 2022 according
20 to surveys, are collateral for the Loans and their loss is not compensable in damages,
21 because they were the assets Farm Credit had the right to collect against in the event of
22 default under the Loans.²⁹ The potential loss of this collateral means the potential loss of
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26 ²⁸ At the time this action was filed, the Vessels were located in Yakutat Bay.

²⁹ Poor Decl., Ex. B-1 and B-2.

1 any recovery for Farm Credit. And, when viewed in comparison to the minimal burden the
2 requested relief places on Yak Timber, it is clear that both mandatory and prohibitory relief
3 is warranted here.
4

5 **G. No Bond should be Required**

6 This Court should not require that any security be posted because Yak Timber
7 literally will suffer no harm if the injunctive relief is granted. *See Jorgensen v. Cassidy*,
8 320 F.3d 906, 919 (9th Cir. 2003) (citing *Barahona-Gomez v. Reno*, 167 F.3d 1228, 1237
9 (9th Cir. 1999)); *Wisconsin Heritages, Inc. v. Harris*, 476 F. Supp. 300, 302 (E.D. Wis.
10 1979); *Scherr v. Volpe*, 466 F.2d 1027, 1035 (7th Cir. 1972); *Smith v. Bd. of Elec. Comm'rs*
11 *of the City of Chicago*, 591 F. Supp. 70, 71-72 (N.D. Ill. 1984). However, in the event the
12 Court determines a bond is necessary, the required bond amount should not exceed
13 \$20,000, given the minimal risk to Yak Timber resulting from AgWest's request to the
14 Court to ensure the safety and security of its collateral.
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18 **VI. CONCLUSION**

19 Farm Credit filed suit seeking the Court's assistance in ascertaining the status of and
20 arresting a Tug and Barge that is security for loans that are in default. The first step in that
21 process is to prevent the Vessels from being further relocated or to deliver them to a safe
22 and accessible location, obtaining certain documents regarding the Vessels, and conducting
23 a marine survey as a pre-requisite to obtaining insurance. The *Winters* factors weigh
24 heavily in favor of granting an injunction here, as Farm Credit primarily seeks to maintain
25 the status quo, and there is little to no burden on Yak Timber. Accordingly, Farm Credit
26

1 respectfully requests the Court grant the Motion and enter the proposed order submitted
2 herewith.

3 DATED this 5th day of May, 2023.

4 CAIRNCROSS & HEMPELMANN, P.S.

5 /s/ **Binah B. Yeung**

6 Binah B. Yeung, ABA #1911112

7 Email: byeung@cairncross.com

8 524 Second Avenue, Suite 500

9 Seattle, WA 98104-2323

10 Telephone: (206) 587-0700

11 Facsimile: (206) 587-2308

12 HOLMES WEDDLE & BARCOTT, P.C.

13 /s/ **Lafcadio H Darling**

14 Lafcadio Darling, ABA #1510084

15 LDarling@hwb-law.com

16 John E. Casperson, ABA #7910076

17 Jcasperson@hwb-law.com

18 3101 Western Avenue, Suite 500

19 Seattle, WA 98121

20 Attorneys for AgWest Farm Credit, PCA